

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CIVIL LOCAL RULE 79-5(b) and (c)

SUPPORT OF KMH DEFENDANTS' ADMIN. MOTION TO FILE SEPARATE REPLY DOCS. UNDER SEAL

1 “KMH defendants”) in this matter. I have custody of the relevant files of Lovitt & Hannan, Inc.
2 related to this action and am familiar with the contents thereof. I make this declaration pursuant to
3 L.R. 79-5(b) and (c) to establish that certain information designated by defendants to be
4 confidential, and acknowledged by the Court to be sealable by its Order dated July 3, 2008, is
5 referred to by the KMH defendants in support of the concurrently-filed Separate Reply of
6 Defendants K-M Industries Holding Co. Inc., K-M Industries Holding Co. Inc. ESOP Plan
7 Committee, and CIG ESOP Plan Committee in Support of Motion for Summary Judgment should be
8 sealed and not made part of the Court’s public files.

9 2. K-M Industries Holding Co. Inc. (“KMH”) is a privately-held corporation comprising
10 two operating subsidiaries, Kelly-Moore Paint Company and Capital Insurance Group. Prior to
11 1999, KMH was known as Kelly Moore Paint Co., Inc. KMH maintains its financial and accounting
12 records, minutes of directors and shareholders meetings, and other materials related to its operation
13 and operating results in strictest confidence and treats such matters as trade secrets. KMH’s shares
14 are not traded publicly and the estimated value of those shares is likewise a closely-guarded trade
15 secret of KMH. Both of KMH’s subsidiaries are engaged in highly-competitive industries.
16 Revealing KMH’s confidential information in the public records of this Court potentially could
17 harm the privacy interests of KMH and put it and its subsidiaries at a competitive disadvantage.

18 3. Plaintiffs’ claims in the captioned lawsuit are premised on alleged violations of
19 Employee Retirement Income Security Act (“ERISA”). In the context of such litigation, the courts
20 have established that certain communications between ERISA Plan administrators, acting as
21 fiduciaries, and the attorneys retained by them, that normally would be protected from discovery by
22 the attorney-client privilege, are subject to a “fiduciary exception” to that privilege. As a
23 consequence, the attorney-client privilege does not bar the discovery by Plan beneficiaries, such as
24 plaintiffs in this action, of otherwise privileged communications. *United States v. Mett*, 178 F.3d
25 1058, 1063 (9th Cir. 1999). Communications subject to the fiduciary exception retain their

1 privileged status as to anyone other than the fiduciary and the beneficiaries. Some documents and
2 declarations submitted by the KMH defendants in support of their motion for summary judgment
3 were produced in discovery in this matter because they were subject to the fiduciary exception.
4 Nevertheless, the KMH defendants continue to claim privilege as to such documents and testimony
5 and continue to assert a claim of privilege as to anyone other than defendants and plaintiffs in this
6 lawsuit.

7 4. Listed below are locations and descriptions of the portions of the separate reply brief
8 which they seek to have sealed and the basis for KMH's claim that such information either is
9 privileged or confidential.

10 5. Separate Reply Brief, page 1:12-14: This portion of the Reply describes an attorney-
11 client communication that was discoverable in this case due to the application of the fiduciary
12 exception.

13 6. Separate Reply Brief, page 1:15-17: This portion of the Reply describes an attorney-
14 client communication that was discoverable in this case due to the application of the fiduciary
15 exception.

16 7. Separate Reply Brief, page 1:20-23: This portion of the Reply describes an attorney-
17 client communication that was discoverable in this case due to the application of the fiduciary
18 exception.

19 8. Separate Reply Brief, page 2:13-15: This portion of the Reply describes the contents
20 of a financial report issued by KMH's accountants which information is maintained as confidential
21 by the company.

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1 9. Separate Reply Brief, page 2:17-19: This portion of the Reply describes the contents
2 of a financial report issued by KMH's accountants which information is maintained as confidential
3 by the company.

4 I declare under penalty of perjury under the laws of the United States of America that the
5 foregoing is true and correct.

6 DATED: July 17, 2008

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8 
9 Terence F. Young